

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

MARTIN L. OTTENSCHOT

CASE NO. 00-60124

Debtor

Chapter 13

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APPEARANCES:

THALER & THALER  
Attorneys for Town of Lansing  
309 North Tioga Street  
Ithaca, New York 14851

RICHARD T. JOHN, ESQ.  
Of Counsel

RICHARD P. RUSWICK, ESQ.  
Attorney for Debtor  
P.O. Box 6693  
Ithaca, NY 14851

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed on behalf of the Town of Lansing, New York ("Town") on May 3, 2000, seeking a determination that enforcement of a judgment of foreclosure on real property located at 17 Ridge Road, Lansing, New York ("Premises"), and owned by Martin L. Ottenschot ("Debtor"), is exempt from the automatic stay pursuant to § 362(b)(4) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). In the alternative, the Town seeks relief from the automatic stay pursuant to Code § 362(d) in order for it to proceed with the sale of the Premises. The Town also requests conversion of the Debtor's case based on an alleged lack of feasibility of the Debtor's proposed chapter 13 Plan. On June 8, 2000, the Debtor filed opposition to the Town's motion.

Oral argument on the motion was held on June 13, 2000, in Binghamton, New York. On July 6, 2000, an evidentiary hearing (“Hearing”) was held in Utica, New York, and the parties were afforded an opportunity to file memoranda of law. The matter was submitted for decision on July 27, 2000.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (G) and (O).

### **FACTS**

The Debtor filed a voluntary petition pursuant to chapter 13 of the Code on January 12, 2000. The Debtor filed his chapter 13 plan on February 18, 2000. The Debtor is the president and sole shareholder of Cortland Paving Company, Inc. (“CPC”), which is engaged in excavation work and road construction.<sup>1</sup> CPC leases the Premises from the Debtor where, according to the Debtor, the business has been operating for approximately 30 years. According to the Debtor, under the terms of CPC’s chapter 11 plan, it pays \$2,500 per month in rent on the Premises. CPC also pays the maintenance, electricity and taxes on the Premises.

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<sup>1</sup> On April 28, 1995, CPC filed a voluntary petition pursuant to chapter 11 of the Code. On February 4, 1999, the Court signed an Order confirming its plan of reorganization. On July 19, 1999, the Court signed an Order approving CPC’s application for a final decree and the case was closed on July 21, 1999.

According to the Debtor's schedules, Manufacturers and Traders Trust Company ("M&T") holds a mortgage on the Premises with a disputed claim of \$153,304.94. *See* Debtor's Exhibit 1. The Town is listed in the Debtor's schedules as holding a secured claim of approximately \$3,270 in connection with a fine for violation of the Town's Junk Storage Ordinance. At the Hearing, Town's counsel indicated that the Town had taken an assignment of M&T's mortgage, as well as an assignment of a judgment of foreclosure entered in favor of M&T. Neither original nor certified copies of the assignments were offered into evidence at the Hearing. Counsel for the Town requests that the Court take judicial notice of copies of the assignment, attached as exhibits to its original motion papers.<sup>2</sup> Counsel for the Town asserts that the assignments are on file in the County Clerk's office and are official records of the State of New York. However, the copies included with the Town's motion bear no notation of having been filed in the County Clerk's office.

## DISCUSSION

Code § 362(b)(4) provides an exception to the automatic stay, allowing governmental entities such as the Town "to remain unfettered by the bankruptcy code in the exercise of their regulatory powers." *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6<sup>th</sup> Cir. 1988). On June 30,

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<sup>2</sup> Subsequent to the Hearing, the Town provided the Court with certified copies of the two assignments, dated April 24, 2000, the judgment of foreclosure, dated June 7, 1996, an Order of Judge Phillip Rumsey, dated June 10, 1999 (Town's Exhibit A), and an Order and Judgment of Judge John C. Howell, dated December 10, 1998 (Town's Exhibit B), and the Town of Lansing Junk Storage Ordinance (Town's Exhibit G). At the Hearing, the Court had agreed to receive Exhibits A, B and G provided the Town furnished it with certified copies.

2000, the Court signed an Order granting leave to the Town to proceed with enforcement of its Junk Storage Ordinance in state court pursuant to Code § 362(b)(4). The Town would have the Court allow it to proceed with a foreclosure sale of the Premises, as well. The Town argues that the sale represents another means at its disposal to further the public health, safety and welfare of the Town's residents and should be exempt from the automatic stay.

Upon careful reading of Code § 362(b)(4), the Court finds that the Town's argument is without merit. Both parties acknowledge that a judgment of foreclosure was obtained by M&T in New York State Supreme Court. That being the case, and without making any finding concerning the validity of any alleged assignment of the judgment of foreclosure, the Court concludes that the judgment was not "obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power." 11 U.S.C. § 362(b)(4). Therefore, Code § 362(b)(4) is inapplicable, and the Town must seek relief from the automatic stay if it is to proceed with any sale of the Premises.

In seeking to lift the automatic stay, the Town has the burden of establishing the validity and perfection of its security interest. *See In re Elmira Litho, Inc.*, 174 B.R. 892, 900-902 (Bankr. S.D.N.Y. 1994); *In re Deeter*, 53 B.R. 623, 625 (Bankr. N.D. Ind. 1985); *In re Jug End in the Berkshires, Inc.*, 46 B.R. 892, 901 (Bankr. D. Mass. 1985) (citations omitted). In this case, the Town has failed to provide the Court with evidence of a factual and legal right to the relief it seeks. The Town contends that it has standing to seek relief pursuant to Code § 362(d) based on assignments from M&T of its mortgage and judgment of foreclosure. While it requests that the stay be modified to allow it to proceed with the foreclosure sale of the Premises, at the Hearing it failed to establish that it has a valid and perfected security interest in the Premises.

Unsupported allegations are not sufficient to meet the Town's burden. *See In re Kim*, 71 B.R. 1011, 1016 (Bankr. C.D. Cal. 1987).

The Town requests that the Court take judicial notice of the assignments, copies of which it attached to its motion. As the Town's counsel correctly points out, Rule 201 of the Federal Rules of Evidence ("Fed.R.Evid."), applicable to judicial notice of adjudicative facts, provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In other words, "[a] high degree of indisputability is the essential prerequisite." *See* Advisory Committee Notes to the 1972 Proposed Rules.

The Town argues that the assignments of M&T's mortgage and judgment of foreclosure are generally known by the residents of the Lansing area based on published press reports, as well as statements of the Debtor. Unfortunately, the territorial jurisdiction of this Court extends further than Lansing, New York, and it is highly unlikely that the existence of the assignments is generally known to residents of Syracuse, Utica or Binghamton.

The Town also contends that the existence of the assignments can be readily validated by checking with the County Clerk's office where they are allegedly filed and recorded. However, it is not a function of this Court to seek out the records of the County Clerk's office to determine whether they were filed. Furthermore, the fact that they may have been filed with the County Clerk's office only serves to give notice to individuals checking the records of the possibility of an interest in the Premises. It does not establish the validity of the assignments and the extent of any interest the Town might have. The fact that copies of the assignments were filed with this

Court, as well, is also not a basis for inferring the truth of the facts contained in them. *See In re Scarpinito*, 196 B.R. 257, 267 (Bankr. E.D.N.Y. 1996) (citations omitted); *see also In re Indian Palms Associates, Ltd.*, 61 F.3d 197 205 (3d Cir. 1995) (noting that “a previously filed court document will generally not be competent evidence of the truth of the matters asserted therein.”).

“[O]ne easily loses sight of some of such basics as the need to make out a prima facie case by competent evidence. Bankruptcy litigation is no different than any other federal litigation practice in this respect.” *In re Applin*, 108 B.R. 253, 262 (Bankr. E.D. Cal. 1989). The Town had notice of the Hearing and should have been prepared to establish the basis for the relief it sought. Because the Town failed to establish the validity and extent of its security interest,<sup>3</sup> the Court need not reach the issue of whether the Town established a substantive basis for granting relief from the automatic stay. The record is also insufficient to establish a basis for converting the Debtor’s case based on an alleged lack of feasibility of the Debtor’s proposed plan.

Based on the foregoing, it is hereby

ORDERED that the Town is not exempt from the automatic stay pursuant to Code § 362(b)(4) when attempting to enforce a judgment of foreclosure against property of the Debtor; it is further

ORDERED that the Town’s motion seeking relief from the automatic stay to enforce a judgment of foreclosure allegedly assigned to it by M&T is denied without prejudice; and it is finally

ORDERED that the Town’s motion seeking conversion of the Debtor’s chapter 13 case

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<sup>3</sup> The Court also notes that while the Town alleged in its motion papers that the Debtor lacks equity in the property, the Town failed to present any proof on that issue as required by Code § 362(g)(1).

is denied without prejudice.

Dated at Utica, New York

this 18th day of September 2000

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge

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Dated at Utica, New York

this 18th day of September 2000

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge